

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:)	
)	
)	DOCKET NO. CWA-10-2017-0069
GENE R. CHEESEMAN AND GR)	
CHEESEMAN CONSTRUCTION, LLC)	CONSENT AGREEMENT AND
)	FINAL ORDER
Juneau, Alaska)	
)	
Respondents.)	

I. STATUTORY AUTHORITY

1.1. This Consent Agreement and Final Order (“CAFO”) is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency (“EPA”) by Section 309(g)(2)(B) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(g)(2)(B).

1.2. The Administrator has delegated the authority to issue the Final Order contained in Part V of this CAFO to the Regional Administrator of EPA Region 10, who has redelegated this authority to the Regional Judicial Officer in EPA Region 10.

1.3. Pursuant to Section 309(g)(1) and (2)(B) of the CWA, 33 U.S.C. § 1319(g)(1) and (2)(B), and in accordance with the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties,” 40 C.F.R. Part 22, EPA issues, and Gene R. Cheeseman and GR Cheeseman Construction, LLC (“Respondents”) agree to issuance of, the Final Order contained in Part V of this CAFO.

II. PRELIMINARY STATEMENT

2.1. In accordance with 40 C.F.R. §§ 22.13(b) and 22.18(b), issuance of this CAFO commences this proceeding, which will conclude when the Final Order contained in Part V of this CAFO becomes effective.

2.2. The Administrator has delegated the authority to sign consent agreements between EPA and the party against whom a Class II penalty is proposed to be assessed pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), to the Regional Administrator of EPA Region 10, who has redelegated this authority to the Director of the Office of Compliance and Enforcement, EPA Region 10 (“Complainant”).

2.3. Part III of this CAFO contains a concise statement of the factual and legal basis for the alleged violations of the CWA together with the specific provisions of the CWA and the implementing regulations that Respondents are alleged to have violated.

III. ALLEGATIONS

3.1. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into waters of the United States by any person, except as authorized by a permit issued pursuant to Section 402 or 404 of the Act, 33 U.S.C. § 1342 or 1344. Each discharge of pollutants from a point source that is not authorized by such a permit constitutes a violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

3.2. Respondents are “persons” within the meaning of Sections 301(a) and 502(5) of the Act, 33 U.S.C. §§ 1311(a) and 1362(5).

3.3. Since 2011, Respondents have owned, possessed, or controlled approximately 1.24 acres of real property located at 5230 Shaune Drive (City and Borough of Juneau Parcel No.

5B1201030040; SSG IV Tract F) in Juneau, Alaska. This property is hereinafter referred to as the “Site” and is depicted in the aerial photograph attached as Exhibit A.

3.4. At the time of the unauthorized activity described below, the Site contained approximately 0.3 to 0.6 acres of wetlands within the meaning of 40 C.F.R. § 232.2 and 33 C.F.R. § 328.3. These wetlands meet the criteria for jurisdictional wetlands in the 1987 “Federal Manual for Identifying and Delineating Jurisdictional Wetlands.”

3.5. The Site’s wetlands are “adjacent,” within the meaning of 40 C.F.R. § 232.2 and 33 C.F.R. § 328.3, to the headwaters of Vanderbilt Creek, a State of Alaska catalogued anadromous fish stream (Stream No. 111-40-10125). In addition, Vanderbilt Creek is listed by the Alaska Department of Environmental Conservation (“ADEC”) as water quality limited for sediments, turbidity, debris, and habitat modification. Vanderbilt Creek flows to the Gastineau Channel, a “water of the United States” as defined in 33 C.F.R. § 328.3(a) and 40 C.F.R. § 232.2 and therefore a “navigable water” as defined in CWA Section 502(7), 33 U.S.C. § 1362(7). Consequently, Vanderbilt Creek and adjacent wetlands impacted by the alleged unauthorized discharges described in paragraph 3.6 below, are “waters of the United States” within the meaning of 33 C.F.R. §§ 328.3(5) and (7) and 40 C.F.R. § 232.2, and therefore “navigable waters” as defined in CWA Section 502(7), 33 U.S.C. § 1362(7).

3.6. From approximately November 2013 to October 2014, Respondents and/or persons acting on their behalf, used heavy earthmoving equipment, such as an excavator, bulldozer and dump truck, to mechanically harvest and clear the Site and place approximately 1,000 to 2,000 cubic yards of fill material into wetlands on the Site for construction and expansion of a gravel pad to store heavy equipment, and construction and other materials. The fill remains in place as of the date of this Order.

3.7. The heavy earthmoving equipment referenced in Paragraph 3.6 is a “point source” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

3.8. The dredged and/or fill materials that Respondents and/or persons acting on their behalf caused to be discharged, as referenced in Paragraph 3.6, included dirt, rock, gravel and silt, each of which constitutes “fill material” within the meaning of 40 C.F.R. § 232.2 and each of which constitutes a “pollutant” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

3.9. By causing such dredged and/or fill materials to enter waters of the United States, Respondents engaged in the “discharge of pollutants” from a point source within the meaning of Sections 301(a) and 502(12) of the CWA, 33 U.S.C. § 1311(a) and 1362(12).

3.10. Respondents’ discharges of dredged and/or fill materials described in Paragraph 3.6 above were not authorized by any permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344. Respondents are therefore in violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

3.11. Each day the dredged and/or fill material remains in place without the required permit constitutes an additional day of violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

3.12. In accordance with Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. Part 19, Respondents are liable for the administrative assessment of civil penalties for violations at the Site in an amount not to exceed \$16,000 per day for each day during which the violation continues, up to a maximum of \$177,500.

IV. CONSENT AGREEMENT

4.1. For the purpose of this proceeding, Respondents admit the jurisdictional allegations of this CAFO.

4.2. Respondents neither admit nor deny the specific factual allegations contained in this CAFO.

4.3. As required by Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), EPA has taken into account the nature, circumstances, extent, and gravity of the alleged violations as well as Respondents' economic benefit of noncompliance, ability to pay, and other relevant factors. After considering all of these factors, EPA has determined and Respondents agree that an appropriate penalty to settle this action is \$12,500.

4.4. Respondents agree to pay the total civil penalty set forth in Paragraph 4.3 within six months of the effective date of the Final Order contained in Part V of this CAFO. The six month payment schedule is warranted based on Respondents' Certification on Payment of Penalty and Undue Financial Hardship (Exhibit B).

4.5. Payment under this CAFO must be made by a cashier's check or certified check payable to the order of "Treasurer, United States of America" and delivered to the following address:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

Respondents must note on the check the title and docket number of this action.

4.6. Respondents must serve photocopies of the check described in Paragraph 4.5 on the Regional Hearing Clerk and EPA Region 10 at the following addresses:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 10, Mail Stop ORC-113
1200 Sixth Avenue, Suite 900
Seattle, WA 98101

Mark S. Jen
U.S. Environmental Protection Agency
Alaska Operations Office
222 W. Seventh Avenue #19
Anchorage, AK 99513-7588

4.7. If Respondents fail to pay the penalty assessed by this CAFO in full by its due date, the entire unpaid balance of penalty and accrued interest shall become immediately due and owing. Such failure may also subject Respondents to a civil action to collect the assessed penalty under the CWA, together with interest, fees, costs, and additional penalties described below. In any collection action, the validity, amount, and appropriateness of the penalty shall not be subject to review.

4.7.1. Interest. Pursuant to Section 309(g)(9) of the CWA, 33 U.S.C. § 1319(g)(9), any unpaid portion of the assessed penalty shall bear interest at a rate established by the Secretary of Treasury pursuant to 31 U.S.C. § 3717(a)(1) from the effective date of the Final Order set forth in Part V, provided however, that no interest shall be payable on any portion of the assessed penalty that is paid within six months of the effective date of the Final Order.

4.7.2. Attorneys Fees, Collection Costs, Nonpayment Penalty. Pursuant to Section 309(g)(9) of the CWA, 33 U.S.C. § 1319(g)(9), if Respondents fail to pay on a timely basis the penalty set forth in Paragraph 4.3, Respondents shall pay (in addition to any assessed penalty and interest) attorneys fees and costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists.

Such nonpayment penalty shall be in an amount equal to 20% of the aggregate amount of Respondents' penalties and nonpayment penalties which are unpaid as of the beginning of such quarter.

4.8. The penalty described in Paragraph 4.3, including any additional costs incurred under Paragraph 4.7, above, represents an administrative civil penalty assessed by EPA and shall not be deductible for purposes of federal taxes.

4.9. The undersigned representative of Respondents certifies that he is authorized to enter into the terms and conditions of this CAFO and to bind Respondents to this document.

4.10. Except as described in Subparagraph 4.7.2, above, each party shall bear its own costs in bringing or defending this action.

4.11. Respondents expressly waive any right to contest the allegations and waive any right to appeal the Final Order set forth in Part V.

4.12. The provisions of this CAFO shall bind Respondents and their agents, servants, employees, successors, and assigns.

4.13. The above provisions are STIPULATED AND AGREED upon by Respondents and EPA Region 10.

DATED:

FOR RESPONDENT:

GENE R. CHEESEMAN, Individual

DATED:

FOR RESPONDENT:

GENE R. CHEESEMAN, Member/Manager
GR CHEESEMAN CONSTRUCTION, LLC

DATED:

FOR COMPLAINANT:

EDWARD J. KOWALSKI, Director
Office of Compliance and Enforcement
EPA Region 10

V. FINAL ORDER

5.1. The terms of the foregoing Parts I-IV are ratified and incorporated by reference into this Final Order. Respondents are ordered to comply with the terms of settlement.

5.2. This CAFO constitutes a settlement by EPA of all claims for civil penalties pursuant to the CWA for the violations alleged in Part III. In accordance with 40 C.F.R. § 22.31(a), nothing in this CAFO shall affect the right of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. This CAFO does not waive, extinguish, or otherwise affect Respondents' obligations to comply with all applicable provisions of the CWA and regulations promulgated or permits issued thereunder.

5.3. In accordance with Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), and 40 C.F.R. § 22.38(b), the Alaska Department of Environmental Conservation has been given the opportunity to consult with EPA regarding the assessment of the administrative civil penalty against Respondents.

5.4. Pursuant to Section 309(g)(4)(A) of the CWA, 33 U.S.C. § 1319(g)(4)(A), and 40 C.F.R. § 22.45(b), EPA has issued public notice of and provided reasonable opportunity to comment on its intent to assess an administrative penalty against Respondents. More than 40 days have elapsed since issuance of this public notice and EPA has received no petition to set aside the Consent Agreement contained herein.

5.5. This Final Order shall become effective upon filing.

SO ORDERED this ____ day of _____, 2017.

M. SOCORRO RODRIGUEZ
Regional Judicial Officer
EPA Region 10

Certificate of Service

The undersigned certifies that the original of the attached **CONSENT AGREEMENT AND FINAL ORDER, In the Matter of: GENE R. CHEESEMAN AND GR CHEESEMAN CONSTRUCTION, LLC, DOCKET NUMBER: CWA-10-2017-0069**, was filed with the Regional Hearing Clerk and served on the addressees in the following manner on the date specified below:

The undersigned certifies that a true and correct copy of the document was delivered to:

Stephanie Ebright
Office of Regional Counsel
U.S. Environmental Protection Agency
Region 10, Mail Stop ORC-113
1200 Sixth Avenue, Suite 900
Seattle, WA 98101

Further, the undersigned certifies that a true and correct copy of the aforementioned document was placed in the United States mail certified/return receipt to:

Gene R. Cheeseman
3920 North Douglas Highway
Juneau, Alaska 99801

DATED this _____ day of _____, 2017 _____

Signature

Teresa Luna
Regional Hearing Clerk
EPA Region 10